IN THE SUPREME COURT
OF THE STATE OF FLORIDA

CASE NO. 85,849

RHONDA KNEALING,

Petitioner,

v

ERNEST PULEO and
MARIA J. PULEO,

Respondents.

ANSWER BRIEF OF RESPONDENTS

LOWER COURT
4DCA CASE NO. 93-2778

Which was an Appeal from the 17th Judicial Circuit
In and For Broward County, Florida
CASE NO. 92-19733 18 (Judge W. Herbert Moriarty)

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASE LAW: **PAGE**

STATUTES

STATEMENT OF THE CASE

ERNEST PULEO and MARIA J. PULEO appealed to the Fourth District Court of Appeal the Order rendered August 24, 1993, denying their Motion to Tax Attorney's Fees and Costs against RHONDA KNEALING, the Amended Final Judgment rendered August 27, 1993, the Cost Judgment rendered August 27, 1993, and the Order denying the PULEOS' Motion for Rehearing and/or to Vacate the Amended Final Judgment and Cost Judgment rendered September 9, 1993. The district court reversed the orders from which the PULEOS appealed and certified to this Court the following question as one of great public importance:

> Do the time requirements in section 44.102, Florida Statutes (1993) represent an unconstitutional intrusion of the legislature on the rule-making authority of the Supreme Court in light of the Supreme Court's analysis in Timmons v. Combs, 608 So.2d 1 (Fla. 1992)?

On June 14, 1995, the clerk of the Supreme Court issued an order postponing the Court's decision on jurisdiction and instructing the Petitioner, RHONDA KNEALING, to file a brief on the merits.

STATEMENT OF THE FACTS

ERNEST and MARIA J. PULEO were defendants in a personal injury suit arising from an automobile accident involving RHONDA KNEALING. The trial court entered a Uniform Pretrial Order setting the case for jury trial on a docket commencing July 12, 1993. (R. 114-115)

The court also entered an order directing mediation and an agreed order scheduling mediation. (R. 116-199) The court-ordered mediation took place on June 16, 1993, and resulted in the declaration of an impasse. (R. 148-149)

On July 1, 1993, fifteen (15) days after the unsuccessful mediation, the PULEOS served an offer of judgment pursuant to section 768.79, Florida Statutes (1989) in the amount of FIFTEEN THOUSAND ONE and 00/100 ($15,001.00) DOLLARS. The offer was not accepted and trial commenced on July 12, 1993.

The trial resulted in a judgment against the PULEOS in the amount of FIVE THOUSAND and 00/100 ($5,000.00) DOLLARS. (R. 201-203) The PULEOS filed their Motion for Attorney's Fees on July 22, 1993 (R. 198-199) and their Motion to Tax Costs on July 30, 1993, (R. 204-205) based on the mandatory provisions of section 768.79, Florida Statutes. RHONDA KNEALING filed her Motion to Tax Costs against the PULEOS on August 4, 1993. (R. 214)

On August 24, 1993, the trial court heard the parties' respective motions. The court denied the PULEOS' Motion for Attorney's Fees and Costs on the basis that (1) the PULEOS' offer of judgment was not timely served; and (2) KNEALING's rejection of the PULEOS' offer of judgment was not unreasonable. (R. 285) The order denying PULEOS' Motion for Attorneys Fees and Costs was rendered on August 25, 1993. (R. 216) On August 27, 1993, the court entered a Cost Judgment in favor of KNEALING and against the PULEOS in the amount of FOUR THOUSAND FIVE HUNDRED THIRTY-NINE and 00/100 ($4,539.00) DOLLARS (R. 217-218) as well as an Amended Final

Judgment against the PULEOS in the amount of FIVE THOUSAND and 00/100 ($5,000.00) DOLLARS. (R. 219-221)

SUMMARY OF THE ARGUMENT

The time requirements in section 44.102, Florida Statutes (1993) do not represent an unconstitutional invasion of this Court's rule-making authority. The pertinent provisions of section 44.102, which were enacted prior to this Court's adoption of the procedural provisions of section 768.79, Florida Statutes, as a rule of this Court, merely provide litigants an additional opportunity to resolve their dispute after impasse has been declared at a court-ordered mediation but before trial commences. The provisions of section 44.102, which facilitate implementation of section 768.79, are entirely consistent with this Court's analysis in Timmons v. Combs, 601 So.2d (Fla. 1992).

An offeror is entitled to an award of attorney's fees and costs based on an offer of judgment made pursuant to section 768.79, Florida Statutes (1989) if the judgment obtained by the offeree is at least twenty-five percent (25%) less than such offer. However, the offeror's entitlement can be defeated if the court determines the offer was not made in good faith. Attorney's fees and costs must be awarded absent a finding the offer was not made in good faith.

The PULEOS' offer of judgment was timely served following the declaration of impasse at a court-ordered mediation and before commencement of trial. RHONDA KNEALING's argument that the offer of judgment was not valid because it failed to cite section 44.102

is without merit since neither section 768.79, Florida Statutes (1989) or section 44.102, Florida Statutes (1993) requires citation of those statutes in an offer or demand for judgment. Further, there has been no suggestion that RHONDA KNEALING's counsel was unaware of the existence and applicability of the statute.

LEGAL ARGUMENT

I. THE TIME REQUIREMENTS IN SECTION 44.102, FLORIDA STATUTES (1993) DO NOT REPRESENT AN UNCONSTITUTIONAL INTRUSION OF THE LEGISLATURE ON THE RULE-MAKING AUTHORITY OF THE SUPREME COURT IN LIGHT OF THE SUPREME COURT'S ANALYSIS IN TIMMONS v COMBS, 608 So.2d 1 (Fla. 1992).

This Court, in Timmons v. Combs, 601 So.2d 1, 3 (Fla. 1992), expressly adopted the procedural portion of section 768.79, Florida Statutes, as a rule of this Court effective July 9, 1992. In the opinion, this Court recognized that a statute creating a substantive right to attorney's fees is not unconstitutional merely because it contains procedural provisions which control the circumstances under which a party is entitled to costs and attorney's fees. Id. This Court has held that all doubt as to the constitutional validity of a legislative enactment be construed to effectuate the express legislative intent. This is particularly true in areas of the judicial process, which necessarily involve procedural and substantive provisions. Leapai v. Milton, 595 So.2d 12, 14 (Fla. 1992).

The procedural aspects of section 44.102, Florida Statutes (1993)[1] are consistent with the expressed legislative intent to provide a forum for alternate dispute resolution, by recognizing that mediation provides an alternative to litigation. With the enactment of section 44.102, the legislature created a forum where the parties, under circumstances such as those presented here, could attempt to resolve their differences prior to trial. By specifically referencing section 768.79, the legislature left no doubt that it intended for it to apply following an impasse at a court-ordered mediation.

The provisions of section 768.79, Florida Statutes (1989) and section 44.102(6)(b), Florida Statutes (1993) are consistent with one another. When a court-ordered mediation results in an impasse, section 44.102 simply modifies the time limitations imposed by section 768.79 by allowing either party an opportunity to serve a new offer at any time prior to trial. Non-acceptance of the offer by the time trial commences is expressly deemed a rejection. Thus, the legislature has simply allowed an enlargement of time within

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[1] The provisions of section 44.102(5)(b), Florida Statutes (Supp. 1990) are identical to the provisions of section 44.102 (6)(b), Florida Statutes (1993) which became effective prior to service of the PULEOS' offer of judgment to RHONDA KNEALING, and provide:

> Section 45.061 and 768.79 notwithstanding, an offer of settlement or an offer or demand for judgment may be made at any time after an impasse has been declared by the mediator, or the mediator has reported that no agreement was reached. An offer is deemed rejected as of commencement of trial.

which to serve and accept an offer of judgment in those instances where a court-ordered mediation has taken place but did not result in immediate resolution of the dispute.

The effect of section 44.102(6)(b), Florida Statutes (1993) is in harmony with prevailing public policy. The legislature enacted section 768.79, Florida Statutes, to provide a means of alternative dispute resolution; if an offeree rejects a good faith offer, the offeree can be held liable for reasonable attorney's fees and costs incurred by the offeror after filing of the offer. Likewise, section 44.102, Florida Statutes, allows an additional opportunity for either party to attempt resolution of the dispute after impasse has been declared at a court-ordered mediation and before trial commences. This Court adopted the procedural portions of section 768.79 in an effort to facilitate application of the statute. Timmons, 608 So.2d at 3. This Court should take the same course of action with regard to section 44.102, Florida Statutes (1993).

The First District Court of Appeal in Nordyne, Inc. v. Florida Mobile Homes Supply, Inc., 625 So.2d 1283 (Fla. 1st DCA 1993) ignores the reasoning espoused in Leapai and Timmons. In Leapai, this Court recognized the "judiciary and the legislature must work to solve these types of separation-of-powers problems without encroaching upon each other's functions and recognizing each other's constitutional functions and duties." Leapai, 595 So.2d at 14. Because the legislature incorporated, by express reference, the timing provisions of section 44.102, together with the substantive aspects of section 768.79, Florida Statutes, the

temporal provisions of the mediation statute should be given the same deference as was accorded the procedural provisions of section 768.79 by this Court in Timmons.

II. SECTION 768.79, FLORIDA STATUTES (1989) DOES NOT PROVIDE FOR THE IMPLEMENTATION OF A "REASONABLENESS" STANDARD WHEN DETERMINING AN OFFEROR'S ENTITLEMENT TO ATTORNEY'S FEES AND COSTS.

The right to an award of costs and attorney's fees based on an offer of judgment made pursuant to section 768.79, Florida Statutes (1989) is not dependent on whether the rejection was reasonable. Schmidt v. Fortner, 629 So.2d 1036, 1041 (Fla. 4th DCA 1993). Section 768.79(2)(a), Florida Statutes (1989) provides only one exception to the mandatory award of fees and costs where an offer exceeds a judgment by more than twenty-five percent (25%). That is, where the offer is not made in good faith.[2] The inquiry as to entitlement of costs and fees pursuant to the provisions of section 768.79, Florida Statutes (1989) is solely an arithmetic calculation and entitlement can only be defeated where there is a finding the offer was not made in good faith by the offeror.

Both Schmidt and Bridges v. Newton, 556 So.2d 1170 (Fla. 3rd DCA 1990) allow for an offeror's entitlement to be defeated where an offer is "not made in good faith." That is a discretionary ruling. The Bridges court goes awry, however, when it fails to distinguish between entitlement to an award and the amount of the

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[2] Section 768.79(2)(a) provides: "If a party is entitled to costs and fees pursuant to the provisions of subsection (1), the court may, in its discretion, determine that the offer of judgment was not made in good faith. In such case, the court may disallow an award of costs and attorney's fees." (Emphasis supplied)

award. The "reasonableness" standard is applied to determine the amount of the fee to which an offeror is entitled, rather than entitlement to the fee. Schmidt, 629 So.2d at 1042. The court's discretion in determining the reasonableness of the award is guided by the language of section 768.79(2)(b) which provides:

> (b) When determining the reasonableness of an award of attorney's fees pursuant to this section, the court shall consider, along with all other relevant criteria, the following additional factors:
>
> 1. The then apparent merit or lack of merit in the claim that was subject to the offer.
>
> 2. The number and nature of offers made by the parties.
>
> 3. The closeness of questions of fact and law at issue.
>
> 4. Whether the offeror had unreasonably refused to furnish information necessary to evaluate the reasonableness of the offer.
>
> 5. Whether the suit was in the nature of a test case presenting questions of far-reaching importance affecting non parties.
>
> 6. The amount of the additional delay cost and expense that the offeror reasonably would be expected to incur if the litigation should be prolonged.

RHONDA KNEALING argues that a reasonableness standard should be applied in this instance because the PULEOS' trial counsel used the phrase "reasonable offer" and therefore, invited error. Rather, it was KNEALING's counsel who suggested to the trial court

the incorrect standard to be applied at the hearing to determine the PULEOS' entitlement to fees:

> The Court: Well, go ahead.
>
> Mr. Bendell: Go ahead, if you are going to rule.
>
> The Court: No, I was going to ask him to explain what his position is.
>
> Mr. Bendell: Even assuming they were going to -- Even assuming you find that this thirty-day period of time was they met their standard in that regard, the offer was not a reasonable offer under the facts and circumstances of this case at the time. If we turn back the hands of time to the time the offer was made, and if, you know, we look at different criteria there, and the lack of merit, etc., and it wasn't reasonable at that time for us to accept it because the jury ended up in effect saying that this was not causally related to the accident in question. (emphasis added) (R. 272-273)...
>
> Given the fact there was nothing unreasonable about us rejecting that offer at the time that the particular offer was made.
>
> That is, we had a reasonable belief that we had good solid merit in our case. We had $15,000-$16,000 in med bills. (emphasis added) (R. 274)

The court subsequently denied the PULEOS' Motion for Attorneys Fees and Costs made pursuant to section 768.79 on the basis that RHONDA KNEALING (1) did not have thirty (30) days notice of the offer and (2) that it was not unreasonable, in the court's opinion, for RHONDA KNEALING to have turned down the offer. (R. 285)

The PULEOS' trial counsel attempted to clarify any misunderstanding at a Motion for Rehearing, and the court indicated

that it relied on a reasonableness standard in determining whether the PULEOS were entitled to fees pursuant to section 768.79:

> The Court: $7,000. The reason I've been making these rulings, and frankly I'd like you all to appeal that too, is the reason is that if, in fact, a defendant makes an offer of judgment, we'll say in this case $15,000, and if in fact the attorney is to collect an attorney fee, we'll just take a third, that's $5,000, that reduces it to $10,000 and if, in fact, there's $7,000 of outstanding medical bills and if, in fact, there are which there usually are a thousand, and I am being very low, a thousand to two thousand costs, in effect, the plaintiff receives no money and I've never felt that a good faith reasonable, whatever you want to call it, offer is such that the plaintiff should settle for nothing. (R. 666-667)

The trial court, although aware of the good faith standard, clearly fails to distinguish between good faith on the part of the offeror and a reasonable rejection by the offeree. Without a finding by the trial judge that the offer was "not made in good faith," the entitlement to fees and costs must be allowed. See Schmidt, 629 So.2d at 1041.

Because there has been no finding that the PULEOS' offer of judgment was "not made in good faith," RHONDA KNEALING cannot rely on the provisions of section 768.79(2)(b), Florida Statutes (1989) to justify the trial court's denial of the PULEOS' Motion to Tax Costs and Motion for Attorney's Fees.

III. THE PULEOS' OFFER OF JUDGMENT WAS TIMELY SERVED; THIS COURT SHOULD DISAPPROVE OF NORDYNE, INC. V. FLORIDA MOBILE HOME SUPPLY, INC., 625 So.2d 1283 (Fla. 1st DCA 1993) AND WRIGHT V. CARUANA, 640 So.2d 197 (Fla. 3rd DCA 1994).

Despite the fact that KNEALING's counsel fails to suggest he was unaware of the provisions of section 44.102 (the vehicle by which the parties agreed to the court-ordered mediation) and that he was unaware of the statute as a basis for the offer, he nonetheless argues that the offer must specifically reference section 44.102, Florida Statutes. Even if one were to accept that ignorance of the law is an excuse,[3] Nordyne is distinguishable as there is no assertion that counsel for KNEALING was not aware of the provisions of section 44.102.

Although KNEALING complains of a "trap" without contending she was "trapped," she relies on Wright v. Caruana, 640 So.2d 197 (Fla. 3rd DCA) in support of her position. The Third District Court of Appeal, in Wright, did not question the constitutionality of section 44.102, Florida Statutes. In the wake of the confusion caused by the Nordyne decision, however, the court ruled that if an offer of judgment pursuant to section 768.79 is served less than thirty (30) days prior to trial, it is valid if the offeree accepts it. Wright, 640 So.2d at 198. Conversely, the same offer, if not accepted, is not valid as a trigger for an offeror's entitlement to fees and costs if it fails to cite section 44.102. Wright, 640 So.2d at 199.

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[3] "... it [section 44.102] may best be described as a trap set by the legislature for those not fortunate enough to have stumbled across it." Nordyne, 625 So.2d at 1290.

The language of section 768.79 and section 44.102 do not manifest a legislative intent to encourage such piecemeal enforcement of the statutes in question. Neither section 768.79, Florida Statutes (1989) or section 44.102, Florida Statutes (1993) require that the statutes relied upon be specifically cited in an offer made pursuant to the provisions of the statutes.[4] This being the case, there is no foundation for RHONDA KNEALING's assertion that section 44.102 must be cited in an offer of judgment made pursuant to section 768.79, Florida Statutes (1989) and filed after a court-ordered mediation has resulted in impasse.

CONCLUSION

The time requirements in section 44.102, Florida Statutes (1993) do not represent an unconstitutional intrusion of the legislature on the rule-making authority of the Supreme Court in the light of the Supreme Court's analysis in Timmons v. Combs, 608 So.2d 1 (Fla. 1992). The offer of judgment served by the PULEOS exceeded the judgment recovered by RHONDA KNEALING by more than twenty-five percent (25%). In the absence of a finding by the trial court that the offer of judgment was not made in good faith, the PULEOS are entitled to costs and fees pursuant to the provisions of section 768.79, Florida Statutes (1989).

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[4] Section 768.79, Florida Statutes (Supp. 1990), applicable to policies or contracts issued or renewed on or after October 1, 1990, was amended to require that an offer must be in writing and state that it is being made pursuant to that statute.

Based on the foregoing, ERNEST PULEO and MARIA J. PULEO respectfully submit that this Court should affirm the opinion of the Fourth District Court of Appeal.

Respectfully submitted,

BY: 

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been sent via U.S. Mail this 14th day of August 1995, to: **MICHAEL BENDELL, ESQUIRE**, Attorney for KNEALING, 7000 West Palmetto Park Road, Suite 300, Boca Raton, Florida 33433, (407) 367-0300.

Respectfully submitted,

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